

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
SUPPLEMENTAL  
APPENDIX**

---

---

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

---

DOCKET NO. 74-1912

---

---

UNITED STATES OF AMERICA,

Appellee,

-against-

GEORGE FLORES,

Appellant.

---

---

SUPPLEMENTAL  
APPENDIX FOR APPELLANT GEORGE FLORES

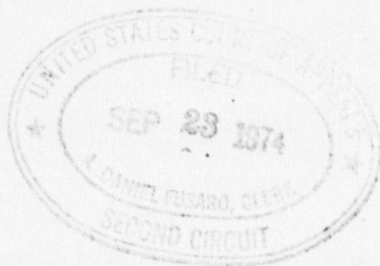
---

---

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK

---

---



DANIEL L. MEYERS  
Attorney for Appellant  
380 Madison Avenue  
New York, New York 10017  
(212) 687-3118

PAGINATION AS IN ORIGINAL COPY



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
----- x  
UNITED STATES OF AMERICA, :  
vs. :  
GEORGE FLORES, :  
Defendant. :  
----- x

73 Cr. 1140

BEFORE: HON. Charles E. Stewart, Jr., D.J.

May 9, 1974  
2:20 P.M. - Room 705

APPEARANCES:

PAUL J. CURRAN, ESQ.,  
United States Attorney  
For the Government,  
BY: ALAN KAUFMAN, ESQ.,  
Assistant United States Attorney.  
  
DANIEL MEYERS, ESQ.,  
For the Defendant.

SAI



1 arcg

2 (In the robing room.)

3 MR. MEYERS: I called to your Honor's chambers today  
4 for the purpose of disposing of pretrial problems, to resolve  
5 certain pretrial problems.

6 Your Honor, we have a threshold problem that needs  
7 resolution. That threshold problem is, I believe, a failure  
8 of the government in this case to comply with the Second  
9 Circuit rules regarding prompt disposition of criminal cases.

10 This is an unhappy situation because my client has  
11 been detained on bail that he has not made for a period which  
12 even that is in dispute. But taking the government's date,  
13 since October 15, 1973 when he was arrested in the District  
14 Court of Puerto Rico. The first court appearance that my  
15 client made subsequent to the removal proceedings was on November  
16 27, 1973 when he was brought before a magistrate, Magistrate  
17 Gotell in this courthouse.

18 For ten days prior to his November 27 appearance Mr.  
19 Flores was detained at West Street and was not called by any  
20 official of this courthouse or by the prosecutorial agencies  
21 to appear before Judge Gotell and on November 27 Judge Gotell  
22 set bail at \$10,000, a personal recognizance bond secured by  
23 \$1,000.

24 That bail, your Honor, was reviewed by Judge Gotell  
25 two days later and there was no reduction.

SAZ

2 On December 27, 1973, Mr. Flores was arraigned for  
3 Judge Carter and the same bail conditions were continued and  
4 the matter was assigned to Judge Stewart for all purposes.

5 On February 11, 1974, I brought on a motion that  
6 was made returnable before Judge Stewart but was referred to  
7 Judge Lasker because your Honor was on vacation. At that bail  
8 application Judge Lasker continued the \$10,000 personal  
9 recognizance bond and required only a five percent security  
10 or \$500 cash. That is Mr. Flores' present bail.

11 Today is May 9, 1974. There have been no pretrial  
12 proceedings in this case, none of which has been caused by the  
13 defendant.

14 THE COURT: Is Mr. Flores out on bail?

15 MR. MEYERS: No, he is here in the custody of the  
16 United States Marshall's office.

17 THE COURT: Still in West Street?

18 MR. MEYERS: Still in West Street, yes, your Honor.

19 Your Honor has been engaged in a trial which com-  
20 menced sometime in February of 1974, the case I understand  
21 is the United States against Riland. Because your Honor was  
22 engaged and the jury is just out now, and we are having this  
23 conference at a time when the jury is deliberating on this  
24 matter.

25 Sometime in April I received a telephone call from

SA3



1 arcg

4

2 a person who purported to be Judge Levitt's law clerk. He  
3 informed me that the matter was referred to Judge Levitt for  
4 all purposes. I in turn got in touch with Mr. Weinberg, your  
5 Honor's law clerk to determine how the assignment was made and  
6 I was satisfied that it was made by the assigning committee  
7 under the rules of this court.

8 On three occasions, none of which were due to the  
9 delay of the defendant, the pretrial conference before Judge  
10 Levitt was cancelled by the Judge. Specifically on April 11,  
11 we went to Judge Levitt's chambers at 4 p. m. A telephone  
12 call to me cancelled that appearance at the Judge's request  
13 and it was adjourned to April 18. On April 18 at 9:30 we  
14 were to have a conference on this case before Judge Levitt  
15 again. Again, it was cancelled by the Judge and no further  
16 date was given.

17 I might add parenthetically that during the entire  
18 period of time I was in constant telephone communication with  
19 Mr. Kaufman and with Judge Levitt's clerk. I was in the  
20 process of trying to move this case.

21 My client has been in jail, it is not a serious  
22 case. The case involved an alleged transfer of one shotgun  
23 for a price of \$125 and to be in jail for as long as he has  
24 been in jail on a case that I think Justice Reinquist  
25 characterized as not really needing to reach the proportions

SA4



2 of a federal prosecution -- he said that in a postal case --  
3 makes this a very unhappy circumstance for my client.

4 Now, we are here today before this court with the  
5 concept that this case is going to trial as soon as the  
6 Riland matter is over. I say, however, your Honor, that  
7 a reading of rule 4 of the Second Circuit Court Rules regarding  
8 the prompt disposition of criminal cases, and having in mind  
9 the two leading cases in this circuit, to wit, Hilbert  
10 against Dowling, 476 Fed Second 355, a 1973 decision and  
11 United States against Lasker, the citation for which is 481  
12 Fed Second 229, this indictment should be dismissed.

13 And now, the prosecutor will speak obviously for  
14 himself. He is going to cite a case to this court of the  
15 United States against Terinkian, 488 Fed Second 873, a  
16 Second Circuit case.

17 The last paragraph of that decision stated without  
18 any citations that under the facts and circumstances of that  
19 case, that because Judge Rosling's calendar was congested and  
20 because of the death of Judge Rosling, Rule 4 would not apply.

21 THE COURT: Have you got a copy of Rule 4 there?

22 MR. MEYERS: Yes, I have a copy of Rule 4.

23 As I read the rule with the exceptions to this absolute six  
24 month rule, I find that none apply except for possibly the  
25 rule which talks in generic terms about extraordinary circum-

SAS

1 arcg

2 stances. I say, your Honor, that if the court congestion is  
3 being urged upon --

4 THE COURT: The problem is, Mr. Meyers, that Rule  
5 4 says, it gives a time within which the government must be  
6 ready for trial. Are you contending that the government  
7 was not ready?

8 MR. MEYERS: I am contending that the government  
9 was actually ready for trial and in the language of Hilbert  
10 against Dowling, the government had to make every effort to  
11 see there was a trial. I admit that a notice of readiness  
12 for trial was served upon me and a copy of which I gather was  
13 served on the court around January 11, 1974.

2 14 Your Honor, on January 11, 1974, I was ready to  
15 proceed to trial. I don't think there is any question in  
16 this case that I never got or ever applied to the court for  
17 an adjournment nor asked for an adjournment, that is not here.

18 What is here is a piece of paper which says they are  
19 ready for trial. This Riland case I know was not on trial,  
20 not a trial case, there was no jury on January 22, 1974, the  
21 day that the government said it would actually commence trial.

22 I think that the government under Rule 4 and under  
23 the language of Hilbert against Dowling has an affirmative  
24 burden to find an available court. Even assuming, Judge  
25 Stewart, that you were going to try the Riland case, at the

SA6



1 arcg

7

2 time the notice of readiness was served and for some two or  
3 three or five or six months thereafter, I would say it is  
4 insufficient for the government not to try to find an avail-  
5 able court to try that case. Especially, your Honor, since  
6 the government's own representation is that this case will  
7 take one day to try, maybe a day and a half.

8 There will be two government witnesses and there  
9 probably will be no defense witness so it is not a case which  
10 will take very long to try.

11 My client is indigent and I am a CJA attorney and  
12 there is no delay caused by my client. He has been in jail  
13 continuously since being arrested in the District Court in  
14 Puerto Rico, he being unable to make the bail.

15 The six months have expired, he has been arrested  
16 more than six months ago and for all the reasons I have  
17 stated, I believe that this indictment, 73 Cr. 1140, must be  
18 dismissed and I so urge at this time.

19 THE COURT: When was he arrested?

20 MR. MEYERS: He was arrested according to the govern-  
21 ment October 15, 1973 on a warrant that was issued August  
22 27, 1973 out of the Magistrate's office in this court.

23 THE COURT: All right. Mr. Kaufman?

24 MR. KAUFMAN: Yes, your Honor. Thank you.

25 So the record may be clear, the warrant for Mr.

SA7



1 arcg

8

2 Flores' arrest was issued as Mr. Meyers said on August 27,  
3 1973. Mr. Flores was thereafter located in Puerto Rico and  
4 on October 15, 1973, was arrested in the District Court of  
5 Puerto Rico.

6 Removal proceedings commenced there and in the  
7 month of November he was removed back to the Southern District  
8 of New York. My information is that he was returned to the  
9 Southern District of New York on November 17, 1973.

10 Due to possible negligence in the Marshall's office,  
11 the United States Attorney's office was never informed that  
12 Mr. Flores had been returned and it was only due to the follow  
13 up phone call on my part to the jail at West Street to find  
14 out whether or not Mr. Flores had returned at, when I was  
15 told he had been there ten days.

16 Immediately upon learning he had been returned we  
17 had him brought over and arraigned before the magistrate.

18 About within a month an indictment was filed and on  
19 January 11, the government filed a statement of readiness for  
20 trial as of January 22, well within the six months from the  
21 date that Mr. Flores was arrested in Puerto Rico on October  
22 15, 1973.

23 Mr. Meyers said since the prospective date for this  
24 trial, which is May 13, 1974, falls at a time which is longer  
25 than six months from the date Mr. Flores was arrested in

SA8

2 Puerto Rico, that under the Second Circuit Rules for prompt  
3 disposition of trials, the indictment should be dismissed.

4 Those rules, though, specifically would relate to  
5 the government filing a statement of readiness for trial and  
6 prosecuting the trial which the government, of course, did,  
7 well within the six month period.

8 Mr. Meyers is now making the argument that it is the  
9 prosecutor's burden once it became aware that your Honor was  
10 not able to try the case due to the continuing Riland trial,  
11 we had an obligation to go Judge shopping and find a judge  
12 who would try the case.

13 Quite frankly, I don't know why the prosecutor's  
14 office, if it does have such a burden, should have a burden  
15 any more than defense counsel. Defense counsel could just as  
16 easily have made a motion to try the case, to have the case  
17 reassigned to a judge because of the fact that the defendant  
18 was incarcerated.

19 No application either formally or informally was  
20 made by Mr. Meyers to my office that we should look around and  
21 try to get the case reassigned.

22 THE COURT: It seems to me that certainly I don't  
23 believe that the defendant has any burden to try to find an  
24 available judge. Equally I am not clear what burden, if any,  
25 the prosecution has.

SA9



1 arcg

10

2 MR. KAUFMAN: As far as the law is concerned, number  
3 one, it is the first I have heard of the case that he is  
4 citing. I am not familiar with them and if there is a legal  
5 argument to be made on it, I request that it be done on  
6 papers.

7 But the case the government is aware of, the one  
8 mentioned by Mr. Meyers holds in the last paragraph that  
9 evidently the defendant was tried more than a year after the  
10 date of his arrest and evidently the reasons for the delay  
11 were, number one, the condition of Judge Rosling's  
12 calendar and, number two, the fact that the Judge died on  
13 April 16, 1973, his death occurring more than six months after  
14 the date of the defendant's arrest and the court held that  
15 there was absolutely no merit to the claim that the indictment  
16 should be dismissed.

17 As far as the calendar congestion and the Riland  
18 case, when your Honor evidently realized that that case was  
19 going to be a lengthy trial, the Flores case was reassigned  
20 to Judge Levitt who was ready to try the case immediately as  
21 evidenced by the fact that he scheduled a pretrial conference.

22 The pretrial conference was scheduled April 12 which  
23 was a Monday or a Tuesday, I believe a Tuesday and when I came  
24 in my office that Monday, I heard that Judge Levitt had taken  
25 ill over the weekend and I am not at all sure of the extent of

SA 10



1 arcg

11

2 Judge Levitt's illness but shortly thereafter we received a  
3 call from his clerk adjourning that pretrial conference for  
4 a week, and again, at the second adjournment it was again  
5 adjourned without date and thereafter we were informed that  
6 the case was reassigned back to your Honor. So the facts  
7 seem fairly similar to those in the Terinkian case as far  
8 as the calendar congestion and illness.

9 THE COURT: There is no question but that it is  
10 unfortunate.

11 MR. KAUFMAN: That case clearly holds that in such  
12 a situation there is no merit to the claim that a dismissal  
13 is warranted under the Second Circuit.

3 14 MR. MEYERS: Your Honor, first of all, the  
15 Terinkian case was the only one Mr. Kaufman read from and  
16 there is no citations for the proposition, we do not know  
17 what the calendar congestion means in the words in that  
18 decision, there are no footnotes to indicate what type of  
19 congestion they were talking about.

20 It seems to me, though, that the language of Judge  
21 Mansfield in Hilbert, and by the way, I believe Judge  
22 Mulligan was the author of the decision we are discussing,  
23 in no way refers in that last paragraph of the predecessor  
24 case of Hilbert against Dowling and the U. S. against Lasker,  
25 anywhere that this circuit attempted as I read in both of those

SA 11

2 cases, to say what they meant as the office of the prompt  
3 disposition rule.

4 And Judge Mansfield, it seems to me in very strong  
5 language talks about the constitutional rights of individuals  
6 that cannot be violated, which is encompassed in the six  
7 month rule. He talks about the government being put on  
8 notice it has to comply with the rules, which he felt has  
9 enough leeway for the legitimate needs of preparing a pro-  
10 secution, it will be foreclosed from proceeding with the  
11 prosecution and use of the word notice. That the government  
12 is on notice.

13 He then talks about the purpose of Rule 4 and in a  
14 decision in which he says it is to insure that regardless of  
15 what the defendant has been promised or his constitutional  
16 rights infringed, that the trial of the charge against him  
17 will go forward promptly. We are not dealing with a statute  
18 that encompasses the public policy of Congress and Judge  
19 Mansfield talks about the congressional history of a speedy  
20 trial rule. That it is the public policy of this circuit  
21 and many other circuits and Congress to see that cases are  
22 tried within six months. This case has not been tried within  
23 six months. The government has the burden to see that it is  
24 to be tried within six months. I say that the government has  
25 failed.

SA12



1  
2 THE COURT: It hasn't been tried within six months  
3 after arrest but still you haven't used the six months since  
4 indictment.

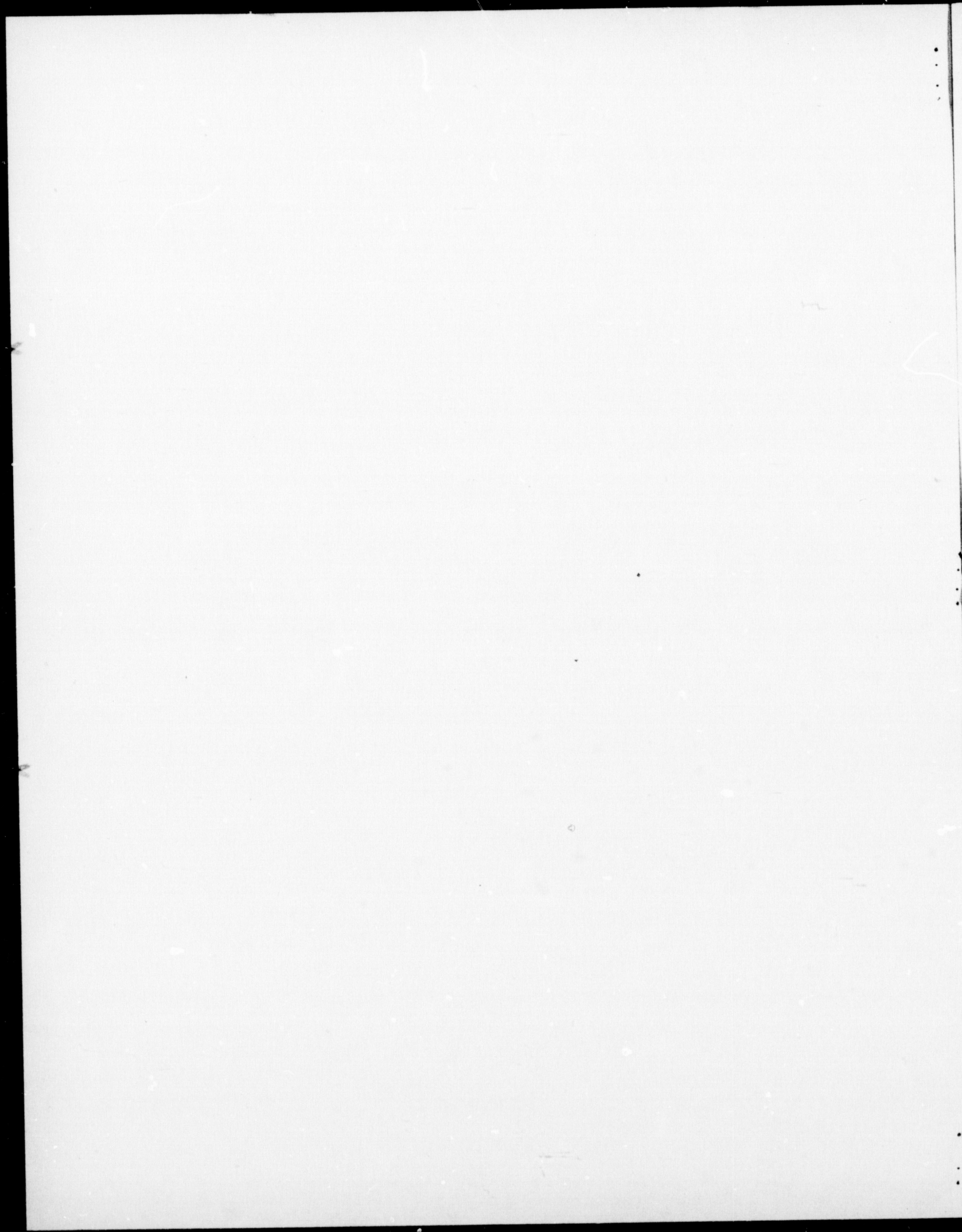
5 MR. MEYERS: Rule 4 says whichever is the earliest.  
6 The government should be ready for trial within six months  
7 from the date of the arrest, service of summons, detention  
8 or the filing of a complaint or formal charge upon which the  
9 defendant is to be arraigned, other than a sealed indictment,  
10 whichever is earliest. The earliest day in this case, your  
11 Honor, it could be argued is August 27. But I wasn't arguing  
12 August 27. I will accept the date of October 15 as the date  
13 of arrest. The rules are clear.

14 THE COURT: I think the rules are clear, Mr. Meyers,  
15 but I think they impose a burden on the government and the  
16 government has met their burden. I will deny your applica-  
17 tion.

18 MR. MEYERS: I just ask you to consider one other  
19 thing they had in Hilbert against Dowling. It went up on  
20 mandamus because Judge Dowling dismissed the first indict-  
21 ment because of the failure of the government to prosecute  
22 within six months. He dismissed without prejudice to the  
23 government to reindict and the government in fact did reindict  
24 and that was a test of the propriety of the government re-  
25 indicting and to run through a six month period.

SA/3





2 Judge Mansfield said that the original dismissal  
3 was a dismissal with prejudice and that this reindictment is  
4 a circumvention that would not be countenanced and the second  
5 indictment was dismissed.

6 So, your Honor, I think that regardless of any other  
7 factors involved in this case, this prosecution is not timely.

8 THE COURT: I disagree.

9 MR. MEYERS: Respectfully except, your Honor.

10 Point two, your Honor, is discovery and inspection  
11 and we have gone through informal discovery and there are  
12 just certain items I might report that we have agreed the  
13 government will give to the defendant what is in dispute under  
14 Rule 16.

15 THE COURT: Why don't you skip that and tell me what  
16 is open?

17 MR. MEYERS: I asked the government to inform me  
18 whether there was an informer who introduced my client to the  
19 undercover agent, whether such informant was present at the  
20 time of the alleged transactions that the indictment is  
21 concerned with; and whether at such time other people were  
22 present during that transaction.

23 My request was, one, to reveal whether there was an  
24 informant, and if there was for me to be able to interview  
25 such informant before the trial of this matter.